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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 566.

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

JOHN W. DAVIS,
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April 4, 1938.

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No. 566.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

Scope of Respondent's Brief.

The respondent in its brief has not been content to rely upon the single ground upon which the Circuit Court of Appeals acted in reversing the judgment of the District Court which dismissed the complaint. That ground was the supposed exemption of the State of Russia from the New York statute of limitations. The two opinions of the Circuit Court of Appeals (R. 281-91) discuss nothing but this question and the language used by this Court in *United States* v. *Belmont*, 301 U. S. 324, cited in connection with this question.

But of the 97 pages of respondent's brief only 33 are devoted to this question (pp. 49-82) and only 8 to the claimed applicability of *United States* v. *Belmont* (pp. 90-7). A good half of respondent's brief in this Court is devoted to questions either here raised for the first time or decided against the respondent below. Respondent has omitted no opportunity

to insert in the text or by footnote every conceivable ground of objection to the judgment of dismissal, including one ground which was conceded below by the respondent.

In the reply to such an argument it becomes necessary to take up respondent's points in order and in detail.

Summary of Argument Herein.

On the supposed issues of fact, respondent makes a partial and misleading summary of the record. On the questions of law, respondent fundamentally errs in confusing with the question here present of the application to a foreign sovereign *plaintiff* of local procedural statutes, the quite unrelated problem of the immunity of the sovereign *as a defendant*. Respondent confuses the question of jurisdiction *in invitum* against a sovereign with the legal effect of the voluntary submission of his claim to the jurisdiction. Respondent also broadens unreasonably and without precedent the Federal power of foreign relations to the exclusion of existing State law.

I. As to respondent's attempt to create an issue of fact (brief, Part One pp. 12-31).

Respondent argues that the petitioner failed below to establish an unequivocal refusal to pay the deposit (brief, pp. 12-29) or at least that there is a conflict of evidence on the point which entitled respondent to a trial (brief, pp. 29-31).

In the effort to make this contention good, the respondent employs expressions which might lead this Court to believe that a complete summary of the record was being presented.[1] In fact the summary offered in respondent's brief is highly partial and misleading.

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[1] For example "an evaluation of the meaning of all the circumstances disclosed even by this record" (p. 14), "an examination of the facts" (p. 15), "the record discloses nothing further * * * until * * *" (p. 25).

A. Petitioner's Repudiation.

The District Court regarded it as plain that actual, unequivocal repudiation of liability by the petitioner in respect of the deposit occurred as early as February 25, 1918 (R. 260), consisting of the application of the deposit by the petitioner on February 25, 1918, against the moneys which it claimed were owing to it by the State of Russia and of the approval of that action on March 14, 1918, by the Executive Committee of petitioner's Board of Directors (R. 259, 82-3). When respondent says that it "seriously" disputes the existence of the repudiation (as distinguished from communication thereof to the State of Russia), we cannot but believe this statement an inadvertence. The closing of the account of the Ministry of Finance, the transfer thereof to a new account, and the charging to such new account of petitioner's claims against the State of Russia in the amount of $9,000,000 with the effect of absorbing entirely the Ministry of Finance account—all this unquestionably constitutes as matter of law a repudiation of liability by the petitioner. Respondent's brief at page 19 seems to recognize the effect of these transactions.

Until the petitioner had made up its mind to appropriate the Ministry of Finance account in payment of its claims against Russia, its refusal to representatives of Russia with respect to the account was much less definite. Two attempts were made by those representatives to obtain the money before February 25, 1918. The respondent spends three pages of its brief (pp. 17-19) in describing those attempts, despite the fact that the District Court based none of its findings thereon (R. 260-4).

B. Respondent's Unfair Account of Notice of Repudiation.

In its account of the facts on the basis of which it asks this Court to find that there was no unequivocal notice of

repudiation, the respondent systematically leaves out of the discussion the facts which compelled the findings of the District Court as summarized at pages 8-9 of our main brief. The respondent omits mention of the testimony of the Russian Ambassador, Mr. Bakhmeteff, that he had many conferences in the office of the Under Secretary of State[1] where he was told that all his endeavors to get the deposit here involved proved to be futile and he could not get it; that Mr. Bakhmeteff was told that the petitioner refused to surrender the money; that Mr. Bakhmeteff knew of claims of the petitioner against the State of Russia; that he knew in a general way that the petitioner had made an offset on its books in payment of those claims against the Government account; and that this set-off was the reason for the petitioner's refusal to release the money (R. 54-6). The Ambassador testified:

> "I would say what I knew was this: That the reason, or all of the reason, why they refused to give this money was the fact that they made that offset."

The respondent omits mention of the affidavit of Conrad de Sahmen, who was prior to November 7, 1917 Director of the Chancery of Credit of the Russian Ministry of Finance (R. 97) and in whose department was the Foreign Section having direct jurisdiction over the account, at the time of its establishment, on behalf of the State of Russia (R. 229, 231). In this affidavit Mr. de Sahmen said (R. 100):

> "I met Mr. Boris Bakhmeteff on numerous occasions when he came to Paris for the Peace Conference early in 1919. Mr. Bakhmeteff and Mr. Ughet, in the course of their conversations with me, in and about 1919, said in substance that the Russian Embassy in the United States had demanded payment of the Ministry of Finance account with the Guaranty Trust Company of

[1] Frank L. Polk, since 1920 a member of this firm. Mr. Polk has had no part in the preparation of this case on behalf of the petitioner.

New York, and that the Guaranty Trust Company had refused to pay."

While mentioning in a footnote (brief, p. 22) the affidavit of Harold Stanley establishing a conversation in June, 1919, at which Mr. Ughet was told by the petitioner that the deposit would not be paid unless the State of Russia paid the petitioner what it owed them (R. 78), the respondent omits mention of the corroborating affidavit of Charles Sargent (R. 78-9). Mr. Sargent, who was present at the conference and who remembered it,[1] says, with reference to a statement at the conference that the Russian Government money with the petitioner should be used to pay $1,625,000 interest on the Russian Government loan payable July 10, 1919:

> "I recall that Mr. Stanley [Vice President of the petitioner] said in positive tones that Guaranty Trust Company would not make this money available. To the best of my recollection he said in substance that Guaranty Trust Company had a set-off against this money but I do not recall the details of what he said on that subject."

Again, while mentioning the interviews between petitioner's counsel and counsel for the Russian Government in June, 1919 and quoting from the correspondence which counsel for the Russian Government had with Mr. Ughet in that connection (brief, p. 23), the respondent ignores the very significant language of Mr. Ughet's letter to his counsel dated July 1, 1919 which respondent itself produced and filed (R. 140):

> "Mr. Russell [petitioner's counsel] in accordance with your letter, states that while the funds of the Guaranty Trust Company have been seized by the Bolsheviki bands, who, quite naturally are not recognized

[1] In this respect differing from Mr. Ughet who testified that he did not remember what took place at the conference (R. 40) but whose testimony is nevertheless used by respondent in the attempt to create a contradiction (brief, p. 23n).

by the United States, the Guaranty Trust Company is not releasing the funds of the Russian National Government * * *."

Also absent from respondent's brief is any reference to the letter which Mr. Bakhmeteff wrote to his counsel on September 12, 1921, referring to the deposit as money (R. 147)

> "which we some years ago so unsuccessfully endeavored to release";

and to the letter which Mr. Murray wrote to the Ambassador on September 23, 1921, describing a conference with petitioner's counsel (R. 149):

> "They both agreed, however, that they could not advise the Guaranty Trust Company to depart from the position heretofore taken by their own office and by the Trust Company. They found on an examination of the records that their office was of the opinion that the Trust Company should not part with the fund, especially as it appeared that it stands to lose more than the amount of the fund."

Inadequate reference is made by the respondent to the petitioner's letter to the Secretary of State dated December 9, 1921 in which it said (R. 109):

> "Shortly after coming into power the Soviet Government took over and merged into the government treasury all banks in Russia, thereby confiscating their property and all balances therein, including those in favor of this Trust Company, representing in value over $8,000,000. As soon as we learned of this seizure early in 1918, we, on advice of counsel, applied the deposit account of the Russian Government with us as a partial offset against the greater amount due to us by the Russian Government through seizure of our property, and when there is a Government in Russia recognized by the United States we shall press our claim for the balance due us, together with interest thereon."

This announcement, while made to the State Department, came to the notice of the assistant representative of the Ministry of Finance and Assistant Financial Attaché, Mr. Ter-Assatouroff (R. 72), and also to that of Mr. Ughet (R. 41).

Respondent's brief barely mentions the affidavit of Mr. Breton, a Vice-President of the petitioner, who testified to conversations with Mr. Ughet and Mr. Ter-Assatouroff in 1918 and 1919 in which he said that the petitioner would not pay the deposit because of its claims against Russia (R. 224-5). This testimony is confirmed by the affidavit of Mr. Ter-Assatouroff, who also described conversations with the petitioner's President to the same effect (R. 71-2).

C. Questions of Law Exclusively Raised by Respondent.

All the questions raised by respondent with reference to the testimony so inadequately summarized in its brief (pp. 12-29), are really questions of law. There is no real dispute as to what happened. The facts of repudiation appear in the papers submitted by the respondent as well as by the petitioner. Thus respondent produced the letter from the Federal Reserve Board official to the Treasury Department dated May 7, 1918 quoting petitioner's Vice-President, Mr. Breton, to the effect that the petitioner had consolidated its Russian accounts and thus disposed of the balance to the credit of the Russian Government (R. 200-1). This information was transmitted to the State Department (R. 201), through whom the Ambassador testified that he learned of petitioner's set-off (R. 55-6).

Respondent points to the fact that in its refusals to pay the deposit the petitioner constantly questioned the Ambassador's authority to draw on the account, and also gave possible double liability as a reason for declining to place the account at his disposal. The petitioner did assign these

reasons also. But it regularly accompanied them with a statement of its own claim upon the account, as abundantly appears from the evidence above summarized showing that the Ambassador and the Financial Attaché understood the non-payment to be due to the petitioner's claims. The Ambassador indeed considered that the petitioner's set-off was "all of the reason" for the refusal (R. 56). As a matter of law, therefore, the District Court properly concluded that the coupling with the refusal of other reasons or wrong reasons did not affect the finality of the repudiation (R. 266).[1]

Certain it is that petitioner's denial of the Ambassador's status with respect to the deposit, in no way misled him or his Financial Attaché. They clearly realized that the ground of petitioner's refusal was its own claim to the money. Moreover they realized, under the advice of their counsel, their full legal right to represent the State of Russia in this country and to sue for the account in its name (R. 113). Nevertheless they elected not to bring the requisite action (R. 146), after several conferences with the State Department (R. 177), which of course was fully cognizant of petitioner's set-off (R. 201).

In all this no possible question arises with respect to the unequivocal character of petitioner's repudiation of liability. *Tillman* v. *Guaranty Trust Company*, 253 N. Y. 295, cited by respondent as showing that the repudiation must

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[1] The failure of the State of Russia to present authorized signatures in accordance with the list of signatures established in 1916 when demanding payment of the account, is immaterial. These signatures were those of officers of the Imperial Russian Government and of minor employees of the Foreign Section (R. 231). These officials and employees of course left the service at the time of the Soviet Revolution (R. 237-40, 270). The designation of authorized signatures was revocable (*Vladikavkazsky R. Co.* v. *New York Trust Co.*, 263 N. Y. 366, 375), and in no way affected the authority of the Ambassador and the Financial Attaché as representing the State of Russia in this country.

In addition it may be noted that Mr. Ughet and Mr. Ter-Assatouroff, who received notice of petitioner's refusal on several occasions, were both representatives of the Ministry of Finance in New York (R. 174-5, 70).

be unequivocal, was an action in which a complaint was likewise dismissed upon affidavits on the ground of the statute of limitations. The defendant's letter of repudiation was written on November 10, 1920, to the Deutsche Bank, Berlin, as agent for plaintiff's assignor. It stated that the claim of plaintiff's assignor for certain balances was not valid, and then added:

> "Complicated legal procedure is necessary to the debiting or crediting of these old accounts, and we would much prefer that any transactions of such a character be postponed until terms with the Russian Government have been settled."[1]

Yet the Court of Appeals had no doubt that Guaranty Trust Company's refusal in the *Tillman* case was unequivocal.

The cases cited by the respondent at pages 30-31 of its brief in support of the claim of a conflict of evidence, are all wide of the situation here presented. Those cases disclose an issue on material facts joined in the opposing affidavits. This case shows substantially no difference of fact, but only conflicting inferences of law from the facts.

D. Uncontradicted Evidence of Demand by the State of Russia.

Respondent's brief overlooks the evidence in the record, substantially undisputed, of a demand by the State of Russia for the deposit. Such a demand starts the running of the statute of limitations under New York Civil Practice Act §15.[2] A demand may be in any form. *Delehunty* v. *Central National Bank*, 37 App. Div. 434 (1899). Any intimation that a payment is desired is a sufficient demand. *Miller* v. *Davis*, 88 Me. 454 (1896); *In re Baltimore Pearl Hominy Co.*, 5 F. (2d) 553, 555 (C. C. A. 4, 1925).

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[1] Papers on appeal in the Court of Appeals, folios 41-2.

[2] Petitioner's main brief, page 92.

Demands for payment of the deposit sufficient to start the running of limitations occurred on numerous occasions. They occurred when Mr. Ughet handed to petitioner the form letter to National City Bank, early in December 1917, and requested the petitioner to make the account in suit available for draft by the Ambassador in the same manner (R. 34); and when the Counsellor of the State Department, in the presence and with the evident approval of Mr. Ughet, early in 1918, asked the President of the petitioner to place the account at the disposal of the Ambassador (R. 14); and when Mr. Ughet and Mr. Ter-Assatouroff in their several interviews with officers of the petitioner made the same request (R. 72, 224); and when Mr. Ughet requested petitioner's Vice-President to make the account in suit available for the purpose of preventing a default on the Russian Government loan on June 18, 1919 (R. 77-8); and when the Protective Committee on July 3, 1919, at the request of Mr. Ughet as Chargé d'Affaires asked the defendant to remit to National City Bank for payment on the Russian Government loan $1,625,000 on account of interest (R. 101, 114).

E. Improper Reference by Respondent to Settlement Negotiations.

In this connection respondent refers (brief, p. 28) to letters which the petitioner and its counsel in 1933—1934, wrote to the President of Amtorg Trading Corporation expressing a willingness to arrive at a settlement with the Soviet Government of "mutual claims in connection with ruble and dollar current account balances of the Guaranty Trust Company on the one hand and the Russian Government and/or the former native Russian banks or bankers on the other hand" (R. 207, 208, 211-2). This was an offer of settlement of approximately $7,226,000 of claims against the petitioner (R. 82) by payment of $250,000 upon one condition being satisfied and a further $750,000 upon a second condition being satisfied. The offer referred to the Ministry of Finance

account as a "former" account (R. 211). It was never accepted and came to nothing.

The impropriety of the introduction into the record of such evidence, is evident. It contains no acknowledgment of indebtedness on the part of the petitioner, and shows merely a desire to buy peace.

> "The rule is well settled that no advantage can be taken of offers made by way of compromise; that a party may, with impunity, attempt to buy his peace."

Tennant v. *Dudley*, 144 N. Y. 504, 507 (1895), citing *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 548 (1876).[1]

The unaccepted offer of $1,000,000 in full settlement was less than the amount claimed, and is therefore incompetent either as an admission of liability or as a tolling of the statute of limitations.[2]

The cases cited by respondent (brief, p. 28n) have no bearing on the use of settlement negotiations as an acknowledgment of indebtedness, deal with conceded acknowledgments, and do not represent the present law of New York as to the requisites and effect of acknowledgment.[3] The law

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[1] See also in accord:

Wemyss Furniture Co. v. *Strober*, 199 A. D. 449, 452 (1st Dept. N. Y. 1922) (offer of defendant to pay more than he subsequently admitted he owed);

Dougherty v. *National City Bank of New York*, 157 Misc. 849, 859, 861 (Sup. Ct. N. Y. 1935) (letters seeking compromise offered to show deposit relationship and acknowledgment);

Manhattan Top & Body Co. v. *White Co.*, 78 Misc. 401, 403 (App. Term N. Y. 1912) (defendant's offer to compromise by rescinding and paying small amount);

2 Wigmore on Evidence (2nd Ed.) Section 1061.

[2] *Union Bank* v. *Deshell*, 139 A. D. 217, 219 (2nd Dept. N. Y. 1910) (tender of check for less than amount claimed); *Heaton* v. *Leonard*, 69 Hun 423, 425 (3rd Dept. N. Y. 1893) (check for less amount tendered as compromise); *U. S.* v. *Wilder*, 13 Wall. 254 (1871) (part payment in full settlement); 1 Williston on Contracts, Section 181; 1 Williston on Contracts (Rev. Ed. 1936), Section 169, page 557.

[3] For the present law of New York on that subject see page 50 below.

is now well settled that where the promisor makes a conditional or hypothetical promise, the debt is not revived except upon the happening of the condition or upon the arrival of the time specified.[1]

F. Adequacy of Present Record.

It is plain on this record that, if a jury were impaneled in this Court, this Court would be obliged to direct a verdict for the petitioner in the absence of any substantial question of fact.

But in any event the present record is in many respects more satisfactory than any future record could be expected to be if the case were sent back for trial. The parties have submitted every available scrap of evidence on the accrual of a cause of action in favor of the State of Russia. At least 85 pages of the record comprise letters and affidavits submitted by the respondent, including statements by the Treasury and the State Department (R. 212-23). Of the four persons most active in connection with the attempt of the State of Russia to obtain the deposit, three are still living.[2] These are Mr. Bakhmeteff, the Ambassador; Mr. Ughet, the Financial Attaché and representative of the Ministry of Finance; and Mr. Ter-Assatouroff, the Assistant Financial Attaché and assistant representative of the Ministry of Finance. The testimony of all these three is represented in this record by examination and cross-examination upon oral questions and answers. The depositions of Mr. Bakhmeteff and Mr. Ughet were taken pursuant to court order (R. 6), and the respondent cross-examined them. Mr. Ter-

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[1] Restatement, Contracts, Section 91; *Tebo* v. *Robinson*, 100 N. Y. 27 (1885) (promise to pay "when able"); *Wakeman* v. *Sherman*, 9 N. Y. 85 (1853) (promise to pay if business successful); *Francis* v. *Rycroft*, 148 A. D. 65, 67 (1st Dept. N. Y. 1911) (promise to pay as soon as estate is "settled").

[2] Charles H. Sabin, President of the petitioner, died October 10, 1933 (R. 83).

Assatouroff's direct examination consisted of an affidavit, but the United States cross-examined and filed the record as an affidavit (R. 151). By the terms of the order, the depositions cannot be received upon the trial of the action (R. 7).[1] As to their testimony, therefore, the only effect of sending the case back for trial would be to entail upon petitioner the risk of their dying or being incapacitated before their testimony could be given in court.

The petitioner has even now lost by death witnesses having knowledge of its repudiation of liability. John H. Fulton, Chairman of the Protective Committee which corresponded with Mr. Ughet in 1919, died on September 25, 1927 (R. 89). Charles H. Russell, petitioner's attorney who conferred with the Ambassador's attorney in 1919, died on February 19, 1921 (R. 84). John P. Murray, counsel to the Ambassador, died about 1930 (R. 85, 131).

The lapse of years since the events involved in the defense of limitations is already reflected in the inability of the witnesses to recall details (R. 40, 91, 235). It is not to be supposed that the recollections of Mr. Bakhmeteff and Mr. Ughet on events that occurred twenty years ago would be fresher upon a future trial than they were at the time of their depositions sworn to in September 1935 (R. 43, 68).

II. As to respondent's attempt to limit the authority of the Russian Ambassador and Financial Attaché accredited and recognized by it during the period 1917-33 (brief, pp. 31-49).

Respondent argues that, even if petitioner's repudiation of liability on the deposit was communicated to Mr. Bakhmeteff and Mr. Ughet more than six years before November 16, 1933, no legal effect flows therefrom because they were

[1] This restriction was required by the rule of *Ex parte Fisk*, 113 U. S. 713 (1885). See *Donnelly* v. *Anderson Brown & Co.*, 275 F. 438, 440 (D. C. S. D. N. Y. 1921).

not authorized representatives of the Soviet Government, the acts of the Soviet Government were retroactively validated by recognition, and their authority during the period 1917-33 was in some way limited. Any such contention is baseless.

A. The Retroactivity of Recognition Does Not Affect Notice Given to a Diplomatic Representative of Russia Recognized by the State Department at the Time.

In our main brief at pages 75-83, we pointed out that the judicially developed doctrine of retroactivity never has been and cannot be applied so as to invalidate acts done outside the foreign country by recognized and accredited representatives of the predecessor regime. The demonstration there made is in no way answered by respondent. Respondent cites the standard authorities on retroactivity of recognition (brief, pp. 32-3) without noticing the analysis made at page 77 of our main brief showing that the acts involved in each of those cases were acts of a newly recognized foreign government in its own country. The principle which validates such acts in the foreign country, cannot extend to *invalidate* acts of the predecessor government by its then recognized representatives in this country.

At all times prior to November 16, 1933, when they ceased to have recognition from the State Department, Mr. Ughet and Mr. Bakhmeteff were the full and unqualified representatives of the *de jure* sovereign of Russia, by virtue of their recognition as such by the State Department. Such recognition is conclusive upon the courts. As this Court said in *Jones* v. *United States*, 137 U. S. 202, 212 (1890), since frequently cited on the point:

> "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the

judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."[1]

The binding quality of the recognition accorded by the political department was recognized by the District Court with respect to Mr. Bakhmeteff and Mr. Ughet (R. 268-9) and also by the Circuit Court of Appeals (R. 282, 283, 91 F. [2d] at 899). The governing principles with respect to Mr. Bakhmeteff and Mr. Ughet as regards both their then status and the legal effect to be given their acts after they should have been displaced by recognition of the Soviet Government, were worked out in 1927 by the Circuit Court of Appeals for the Second Circuit in the *Lehigh Valley* case, 21 F(2d) 396, 400, certiorari denied 275 U. S. 571. It is meaningless to say of this decision, as the respondent does (brief, p. 32), that it is inapplicable because decided "on the basis of non-recognition of the Soviet Government." As is pointed out in our main brief at page 79, the Circuit Court of Appeals specifically dealt with the effect on the judgment of future recognition of the Soviet Government, and held that recognition would not invalidate retroactively acts performed outside Russia. The basis upon which that court's opinion proceeded was the distinction on which we rely between the state and the government representing it (petr.'s main brief, pp. 80-2).

The representative of the Soviet Government designated by it in the United States during the period or part of the period prior to November 16, 1933, Mr. Ludwig Martens (R. 190, 218), was denied by our courts any right or title with respect to property of the State of Russia, against the protest of Mr. Bakhmeteff and upon the certificate of the State Department. *The Rogdai* (D. C. Cal. 1920), 278 F. 294, 279 F. 130; *The Penza* (D. C. E. D. N. Y. 1921), 277 F. 91.

[1] See also cases there cited.

In the latter case Judge Manton cited as binding upon him a press release of the State Department issued May 6, 1921, as follows:

> "The Department of State has received numerous inquiries regarding Mr. L. A. Martens, claiming to be a representative of a Russian Socialist Federated Soviet Republic. The department feels it to be its duty to inform the public that Mr. Martens has not been received or recognized as the representative of the government of Russia, or of any other government. As the United States government has not recognized the Bolshevik regime at Moscow as a government, extreme caution should be exercised as to representations made by any one purporting to represent the Bolshevik government."

It seems to us the height of frivolity for the Government which made that statement to its nationals to contend in this Court that the petitioner's notice of repudiation of liability would have had to be given in 1918-20

> "at least to the designated representative of the Soviet Government in the United States, Mr. Ludwig Martens" (respt.'s brief, p. 33).

B. RESPONDENT'S EFFORT IN ITS BRIEF TO QUALIFY AND REPUDIATE THE STATUS DUE THE RUSSIAN AMBASSADOR AND FINANCIAL ATTACHÉ BY VIRTUE OF THE RECOGNITION ACCORDED THEM BY RESPONDENT PRIOR TO NOVEMBER 16, 1933, MUST FAIL.

In respondent's brief (pp. 33-46), we see the extraordinary spectacle of the Government which prior to November 16, 1933 accredited to its nationals Mr. Bakhmeteff and Mr. Ughet as the representatives of the State of Russia in this country, attempting now and for the purposes of a particular litigation to limit and to derogate from the authority due them in this Court by virtue of that recognition.

1. It is true that the State Department is not a party to this change of position. The letter of Secretary Hull dated

November 21, 1935 in all respects confirms the diplomatic powers of Mr. Bakhmeteff and Mr. Ughet to June 30, 1922 and November 16, 1933 respectively (R. 216-9). The Secretary of State presents to this Court the same certificate with reference to Mr. Ughet's recognition as Chargé d'Affaires (R. 186) which the District Court had before it in the *Lehigh Valley* case in 1919, 293 F. 133, 134.

At all times during the incumbency of Mr. Bakhmeteff and of Mr. Ughet the State Department certified their status respectively as Ambassador and as Financial Attaché, without limit or qualification. Examples are the certificate of Secretary Lansing dated October 31, 1918 with reference to Mr. Bakhmeteff, and that of Acting Secretary Polk dated July 2, 1919 with reference to Mr. Ughet in the *Lehigh Valley* case, 293 F. 133; the certificate of Secretary Lansing dated May 8, 1919 with reference to Mr. Bakhmeteff in *Agency of Canadian Car and Foundry Co.* v. *American Can Co.*, 258 F. 363, 368 (C. C. A. 2, 1919); the certificate of the State Department dated April 6, 1920 with reference to Mr. Bakhmeteff in *The Rogdai,* 278 F. 294, 295; the State Department's letter of June 24, 1919 referred to in *The Penza,* 277 F. 91, 93; the certificate of Secretary Hughes dated February 19, 1923 with respect to both Mr. Bakhmeteff and Mr. Ughet (R. 247); and the certificate of Acting Secretary Olds dated December 20, 1927 with respect to Mr. Ughet (R. 246). On the faith of the latter two certificates the courts ordered to be paid an aggregate of $984,104.62 (R. 243) by Lehigh Valley Railroad Company to Mr. Ughet on behalf of the State of Russia. Of this amount $764,554.89 came into the hands of the United States (respt.'s brief, p. 43).

2. Despite this general course of unqualified recognition and the broad powers which the law confers upon the diplomatic representatives of a foreign state, the respondent has attempted in its brief to dilute and qualify their status and their authority in view of their dealings with this petitioner. The positive and repeated recognition which the

State Department accorded to them in numerous certificates of their status is represented for the purposes of this action as (brief, p. 40)

> "a continuing restricted authority, based entirely on our Government's sufferance and consent."

Respondent prefers to say that our Government "did not deny" the status of the Ambassador and Financial Attaché (brief, pp. 34, 42). Their authority is referred to as "limited authority" (pp. 41, 42). It is implied that such authority extended only to matters which the United States "wished settled" (p. 43), and that they were in reality the puppets of American national interest serving particular and limited ends of our Government during the whole time when the Government held them out to American nationals and to the courts as the diplomatic representatives of a foreign sovereign.

We submit that the courts will not tolerate any such procedure. The rule of *Jones* v. *United States*, 137 U. S. 202, 212, quoted at page 14 above, which was followed in *Agency of Canadian Car and Foundry Co.* v. *American Can Co.*, 258 F. 363 (C. C. A. 2, 1919), and in the *Lehigh Valley* case, 21 F. (2d) 396, certiorari denied 275 U. S. 571, obliges the courts to accept the determination of the political department as to the sovereign of any foreign territory. That determination once made, as it was so definitely and frequently with respect to Russia, our courts will draw for themselves the full legal consequences of sovereignty and of the ambassadorial status. The political department informs the judiciary regarding the foreign governments with which it is in relation, but does not in any way control the judiciary with respect to the legal consequences. These are determined by the judicial process alone. It is useless for the respondent to try to spell out from a few of the instances in which the Ambassador and the Financial Attaché acted, limitations of law upon their authority. This record in fact

does not support any such limitations. In every respect the credit accorded by the State Department to Mr. Bakhmeteff and Mr. Ughet while they occupied their official positions on behalf of the State of Russia was full, complete and unqualified.

The courts so understood it. See *The Penza,* 277 F. 91 (D. C. E. D. N. Y. 1921), and *Lehigh Valley Railroad Co. v. State of Russia,* 293 F. 133 (D. C. S. D. N. Y. 1919), 293 F. 135 (D. C. S. D. N. Y. 1923) writ of prohibition denied 265 U. S. 573 (1924), affirmed 21 F. (2d) 396 (C. C. A. 2, 1927), writ of certiorari denied 275 U. S. 571 (1927). Nor is it in any way true that the courts considered the authority of the Ambassador or Financial Attaché flowing as a matter of law from the status conferred upon them by the recognition of the political department, to be circumscribed (as respondent now intimates, brief, pp. 40-2) to the purposes of specific law suits. In *State of Russia* v. *Bankers Trust Co.,* 4 F. Supp. 417 (D. C. S. D. N. Y. September 18, 1933),[1] Judge Coleman sustained the right of Mr. Ughet as Financial Attaché to sue a New York bank for $115,333.05 on the basis of an agreement which he had made with the defendant on behalf of the State of Russia, saying (p. 419):

> "The court is precluded from inquiring whether Ughet as Russian financial attache had actual authority from the plaintiff in making the agreement which the plaintiff alleges and in causing this suit to be brought, because of the express recognition of his authority by the political branch of the American government which has been certified to by the Secretary of State. Lehigh Valley R. R. Co. v. State of Russia (C. C. A.) 21 F. (2d) 396. Notwithstanding the differences in the facts,

[1] Affirmed (after the substitution of the United States as assignee under the Litvinov assignment, 69 F. [2d] 44) in 83 F. (2d) 236, where the Circuit Court of Appeals acted on the principle that the claim of a foreign sovereign, when put in litigation in a municipal court, must be judged in every way like that of a private litigant. This Court denied certiorari, 299 U. S. 563 (1937).

the principles of that decision are clearly controlling in this."

3. So clear are the powers of Mr. Bakhmeteff and Mr. Ughet as representatives of the State of Russia for the period 1917-33 that the respondent is without excuse, we submit, in questioning or appearing to question their right to sue for the Ministry of Finance account with the petitioner. Respondent refers to "the doctrine, supported by considerable authority, that an ambassador may not sue without the express consent of his government" (brief, p. 46). Any such contention approaches the frivolous. The case of *Baron Penedo* v. *Johnson*, 29 L. T. 452 (1873) from which a sentence is quoted[1] appearing to support this contention, in reality decided only that a foreign minister suing on behalf of his sovereign cannot sue in his own name.[2] *Colombian Government* v. *Rothschild*, 1 Sim. 94 (1826), decided that a foreign sovereign could not sue in the name of the foreign state alone, but must sue in the names of public officers who can be subjected to a cross-bill. 1 Sim. at 104. The dictum of the Attorney General which respondent cites to this Court as law (brief, p. 46) referred only to the principle above mentioned that the ambassador may not sue on behalf of his sovereign in his personal name. And even more patently irrelevant is the group of cases and authorities which respondent tenders at page 46 of its brief for the rule that an ambassador may not submit himself or his nation to the jurisdiction of a foreign court without the express author-

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[1] The quotation is slightly varied from the language of the report.

[2] Defendants demurred

> "on the ground that the money lent to the Prince and Princess being the property of the Emperor of Brazil, the bill ought to have been filed in his own name, and not in that of his minister."

To the same effect see *Schneider* v. *Lizardi* (1846) 9 Beav. 461, 466; *Hullett* v. *King of Spain* (1828) 2 Bligh N. S. 31, 54-5 (dictum); *Don Diego de Acuna* v. *Bingley* (cir. 1616) Hob. 78, 113. It is manifest that this principle has nothing to do with the one under discussion.

ization of his government.[1] These authorities relate to the waiver of immunity as a defense by the foreign state through its ambassador.

As to the general and unlimited authority of an ambassador to bring action on behalf of his state, according to public international law as interpreted by our courts, there is no room for doubt. See the language of Story, J. in *The Anne* (1818) 3 Wheat. 435, 446; *Suarez* v. *Suarez* [1918] 1 Ch. 176, 191; *Republic of Mexico* v. *De Arangoiz* (1856) 5 Duer (12 N. Y. Super.) 634, 643, 646; instruction of State Department to American Minister at Vienna in 1874, 4 Moore Int. Law Dig. p. 636; Mayer D. J. in *State of Russia* v. *Lehigh Valley R. Co.*, 293 F. 133, 135; *Compania Española de Navagicion Maritima S. A.* v. *S. S. Navemar*, No. 242 October Term 1937, decided January 31, 1938. The principle established by these authorities with reference to Mr. Bakhmeteff's power to sue for the account here involved, was clearly stated by the Ambassador's counsel to petitioner's counsel in 1919, as follows (R. 113):

> "In reply to enquiry, Mr. Murray of Coudert Brothers says that in his opinion the Ambassador is the Russian Government, and has the right to direct the Guaranty what to do with the Russian Government deposit; that, as held in the Lehigh Valley case, the Ambassador can institute an action against the Guaranty in the name of the Russian Government; that, under the opinion in the Can case, there can be no defense to a demand by the Ambassador; that we cannot go back of his authority as Ambassador, as shown by the State Department certificate; that in the case of a judgment against the Guaranty, it could pay by cheque to the order of the Russian Government, delivered to the attorneys for the Russian Government."

Petitioner's counsel did not seriously dispute this statement of the law (R. 137). Indeed he could not do so.

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[1] *Dickinson* v. *Del Solar* [1930] 1 K. B. 376; *Suarez* v. *Suarez* [1918] 1 Ch. 176; and similar authorities are given for this proposition.

4. The *actual* authority of the Ambassador over the account in suit is clear upon this record. Respondent's brief disproportionately emphasizes (pp. 18, 19, 22, 23, 24, 25, 26, 32n, 41, 45) the petitioner's denial of any power in the Ambassador with respect to the account. The petitioner's views on the subject are quite immaterial, it being clear upon this record that they in no way misled the Ambassador or his counsel as to his rights (R. 113). What is material is the authority with which the Ambassador is clothed as matter of law (pp. 19-23 above) and the power expressly given him by his government. As to his express authority, we have the affidavit of the Director of the Credit Chancery, Conrad de Sahmen, answering the question which the United States put to him (R. 99):

> "(6) Question. Did Mr. Boris Bakhmeteff, as Russian Ambassador, have the right to draw against this deposit account, and if so, under what conditions?
>
> Answer. Mr. Boris Bakhmeteff was vested with extraordinary powers. He was the only Ambassador who held authority to dispose at his discretion of all accounts of the Russian Ministry of Finance (including those of the Section Etrangere). There were no conditions to this power. He held the same rights as the Minister of Finance."[1]

Mr. de Sahmen, as has been mentioned (p. 4 above), was in charge of the department of the Imperial Russian Government Ministry of Finance to which was originally

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[1] Respondent points to the statement of Mr. Ter-Assatouroff (R. 153-4, 157) that Mr. Bakmeteff had no authority to withdraw funds. It appears, however, that Mr. Ter-Assatouroff had in mind the established signatures and meant only that Mr. Bakhmeteff's was not one of them; see at R. 153, 231. Before his visit to America in January 1917, Mr. Ter-Assatouroff was frequently sent abroad on official missions (R. 69), and cannot have had means of knowledge regarding the Ambassador's authority over the account at all comparable with the knowledge of the Director of the Credit Chancery. Further it appears that Mr. Ter-Assatouroff was averse to the Embassy's policy of using the funds in National City Bank and Guaranty Trust Company (R. 157).

given immediate control over the account. His testimony on the question of the Ambassador's actual authority, is of the highest probative value. It is not mentioned in the brief of the respondent.[1]

Respondent seeks to contrast with the account in suit the accounts of the Russian Government with the National City Bank of New York, upon which, respondent says (brief, p. 36),

"Bakhmeteff was expressly authorized to draw."

This statement is incorrect. The language of the State Department cited therefor (R. 213) is that Mr. Bakhmeteff "was authorized to draw" against the balances with National City Bank, not that he was "expressly" authorized. And the State Department in connection with the Ambassador's authority predicated it upon his original appointment and his recognition by the United States (R. 213). In fact it does not appear that with respect to the accounts with National City Bank Mr. Bakhmeteff had any other or different authority than he had with respect to petitioner's Ministry of Finance account.[2] *That account was under the same name and established under the same conditions as the Russian Government account with National City Bank* (R. 248-9). At the opening of the account in suit, on July 18, 1916, the petitioner cabled the Chancery of Credit of the Imperial Russian Government at Petrograd (R. 227)

> "On July Tenth value July Eleventh we opened credit of Twenty-Five Million Dollars in name of Section Etrangere du Minister des Finances de Russie on the same terms as the same account at National City Bank."

The list of signatures originally established for drawing on the account was received by the petitioner from National

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[1] Nor was Mr. de Sahmen's affidavit, though solicited by the United States (R. 97, 99), submitted by it to the District Court.

[2] Mr. Ter-Asatouroff was equally averse to the Embassy's policy of using the funds in both banks (R. 157).

City Bank (R. 228) as the persons authorized to draw against the account of similar name on the books of that bank (R. 248-9). Among the moneys handled by Mr. Ughet on behalf of the State of Russia in the accounts with National City Bank was an account entitled Section Etrangere du Ministere des Finances No. 2. The balance from this account, after payment of the obligations of the Russian Government, went to the United States as a creditor of Russia (R. 180-1, 177). The sums involved in the transactions of the Ambassador and the Financial Attaché through the accounts with National City Bank amounted to millions of dollars.[1] Out of these accounts, handled with its approval by the Russian Ambassador in the name of his sovereign, the United States itself benefited as a creditor of Russia.

The reversal of position which the United States would have this Court sanction, threatens the finality of these transactions, some of which went through an account bearing the same title as the account with petitioner. No distinction can be drawn between the acts of Mr. Bakhmeteff and Mr. Ughet with the petitioner, which the respondent seeks to repudiate by an attack on their authority and through the doctrine of retroactivity; and the acts of payment and settlement had in the National City Bank situation with the approval of the United States.

5. The record, as has been shown, demonstrates the incorrectness of the statement in respondent's brief (p. 44) that the account with petitioner was not within the scope of the matters concerning which our Government permitted Mr. Bakhmeteff and Mr. Ughet to continue to act. So far was

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[1] From a letter written by the Secretary of the Treasury to the Secretary of State on June 2, 1922, and based upon information furnished by representatives of Russia, it appears that a total of $76,000,000 went through a liquidation account of the Ambassador with National City Bank. Disbursements from it were made for supplies, transportation, storage, inspection, interest on United States Government and on private loans, salaries and upkeep of the Russian Embassy and consulates in the United States, and various miscellaneous purposes. Combined Annual Reports of the World War Foreign Debt Commission, 1922-6, page 86.

this from being the fact, according to the knowledge of respondent itself, that in connection with its acquisition of Russian assets in this country in 1933, *the respondent took from Mr. Ughet an assignment of the account in suit.* This assignment was executed by Mr. Ughet on behalf of the State of Russia as Russian Financial Attaché and custodian of the property of the Russian Government in the United States on August 25, 1933 (R. 254-6). Among the items so assigned by Mr. Ughet to the United States, was the following (R. 255):

> "(1) Claim for approximately $4,976,722.78 with interest for a balance of the Russian Government with the Guaranty Trust Company of New York."

C. Respondent's Attempt to Alter the Record After Judgment, Should be Denied.

Respondent argues (brief, pp. 39 ff.) that the acts done by American nationals relating to property of Russia in this country, which are expressly saved from question by the Litvinoff assignment, comprise only such acts as were done "with the approval of and under the control of our Government." We have already shown in our main brief (pp. 82-3) that the Litvinoff assignment is not to be so interpreted. *State of Russia* v. *National City Bank*, 69 F. (2d) 44, 48 (C. C. A. 2, 1934). In an effort to change the record in this respect, the respondent has caused to be written by one executive department to another, and has inserted in its brief in this Court, a letter dated June 18, 1937.[1] This letter is

[1] Appendix to respondent's brief, page 106. No date appears on the letter as reprinted by respondent. No date is given for it in respondent's brief. The letter was furnished to the Circuit Court of Appeals by the United States Attorney with a letter to the Court dated June 22, 1937 (i.e. just two weeks after the argument). In his letter of June 22, 1937, the United States Attorney said: "There is enclosed for your information a photostatic and three typewritten copies of a letter dated June 18, 1937, addressed by the Secretary of State to the Attorney General. This letter only came to my attention today."

written by the State Department to the Department of Justice. In the portion thereof quoted at page 40 of respondent's brief, the letter states what the Soviet Government "is understood to have agreed" in the Litvinoff assignment.

It will not escape notice that, by what must be an inadvertence, the writer of the letter of June 18, 1937, has omitted from the scope of the protection which the Litvinoff letter expressly afforded to perfected transactions in the United States acts done by nationals of the United States relating to property of a government of Russia; that is, *acts done by the petitioner*. This omission clearly appears from a comparison of subdivision (b) of Mr. Litvinoff's letter (respt.'s brief, p. 101), as accepted by the President (p. 103), with the State Department's interpretation (p. 107).

We cannot think that such an employment of the governmental prerogative to affect the result of litigation with one of its nationals, will have the approval of this Court. The petitioner obtained final judgment against the United States on November 6, 1936 (R. 276). The appeal was argued in the Circuit Court of Appeals on June 8, 1937. The letter sought to be added to the record was not written until June 18, 1937. We protested against its receipt by the Circuit Court of Appeals, and we protest against the receipt or use of it in this Court and ask that it be excluded from consideration. The true meaning and effect of the Litvinoff assignment is a matter for judicial construction and should not be influenced by *ex parte* and unilateral declarations by one of the parties in interest. Compare *Fourteen Diamond Rings* v. *United States* (1901), 183 U. S. 176, 180; *Union of Soviet Socialist Republics* v. *National City Bank*, Special Term Part III, New York County, February 15, 1938.[1]

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[1] Reported in the New York Law Journal for February 15, 1938. In this action by the Soviet Government seeking to reach an alleged deposit with National City Bank, the plaintiff tendered a letter of the Soviet Ambassador purporting to interpret the Litvinoff assignment. Mr. Justice McCook said: "The court must make its own interpretation and, upon the basis of the documents submitted, finds that the claim in question was included among those released, and has become forever barred."

D. The Test of the Running of Limitations Is the Right of the State of Russia to Sue, Not the Right of the Soviet Government to Sue.

Respondent's argument that the statute of limitations could not begin to operate in favor of the petitioner because the Soviet Government was disabled to sue in our courts (brief, pp. 47-9), is founded upon the obvious fallacy that the Soviet Government was owner of the deposit (brief, p. 31). Respondent's brief ignores *The Sapphire* (1870) 11 Wall. 164, which is the classic statement of the principle that the real owner of the property of a sovereign is the state itself, and that the government is but the agency or representative of the national sovereignty. This principle is expressly applied to the status of Mr. Bakhmeteff and Mr. Ughet in the opinion of the Circuit Court of Appeals for the Second Circuit in *Lehigh Valley Railroad Co.* v. *State of Russia*, 21 F. (2d) at 400, citing also *State of Texas* v. *White* (1868) 7 Wall. 700, *Cherokee Nation* v. *Georgia* (1831) 5 Pet. 1, 52, and *The Rogdai* (D. C. Cal. 1920) 278 F. 294.

The vital distinction between the foreign state and its government, as regards claims in this country to state property, is clear and is thoroughly established. The application of that distinction to the situation of the Provisional Russian Government as the agent of the State of Russia in this country until November 16, 1933 to the exclusion of the Soviet Government, was stated in our main brief at pages 80-1. To that statement no answer is attempted by the respondent. Its contention based on the inability of the Soviet Government to sue, during the time when the Provisional Government in the persons of Mr. Bakhmeteff and Mr. Ughet were alone entitled to sue for the State of Russia in this country, is unfounded. The accrual of the cause of action and the running of limitations in this case are predicated upon the right to sue of the State of Russia as represented by the Provisional Government, not as represented by the unrecognized Soviet Government.

If the unrecognized Soviet Government could be assimilated to the position of a *cestui que trust* disabled from suing, the existence of the Provisional Government through our diplomatic recognition as a trustee with power to sue, caused the statute of limitations to run against the Soviet Government also. See *Meeks* v. *Olpherts* (1879), 100 U. S. 564, 569; *Dowell* v. *U. S.* 86 F. (2d) 120, 122 (C. C. A. 5, 1936). The same rule applies to agents with the power to sue. In 2 Mechem on Agency (2nd Ed.) Sec. 1804, page 1388, it is said:

> "So where an agent had sufficient authority to institute an action based on his own knowledge, the principal was held to have notice of all the facts under which the agent acted."

The agent in this case was the Provisional Government, the principal the State of Russia.[1]

III. As to the claimed exemption of foreign sovereigns from state statutes of limitations (Respt.'s brief, Part Two, pp. 48-82).

Respondent devotes to this point, which was the sole ground of reversal in the Circuit Court of Appeals, one-third of its brief. The primary fallacy here is the refusal to recognize that the main-spring of the rule *nullum tempus occurrit regi*, as applied by our courts, is the public interest of the local sovereign, and that the absence of any interest of the *local* sovereign in the affairs of a *foreign* sovereign prevents

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[1] When on November 16, 1933, the Soviet Government, by virtue of its recognition by the United States, succeeded the Provisional Government as agent, trustee or representative of the Russian State in this country, it no less than its principal the State of Russia, was bound by and compelled to adopt as its own the acts of the former Government with reference to Russian property in this country. *United States* v. *Prioleau*, 2 H. & M. 558, 568 (1869); *United States* v. *McRae*, L. R. 7 Eq. 69, 75 (1869); *Voevodine* v. *Government of the Commander-in-Chief of the Armed Forces in the South of Russia*, 232 App. Div. (N. Y.) 204, 209 (1931).

extension of the privilege to foreign sovereigns. *French Republic* v. *Saratoga Vichy Spring Co.* (1903) 191 U. S. 427, 437. Respondent confuses the clearly-marked function and purpose of the rule *nullum tempus*, which limit its benefits to the local sovereign, with the unrelated principle of sovereign immunity.

A. The Rules of Decision Act Authorizes the Application of State Laws to Foreign Sovereigns Exactly as to Private Litigants.

In arguing that the Rules of Decision Act does not permit the application of state statutes of limitations to foreign sovereigns (brief, pp. 50-3, 83) the respondent concededly raises a point not raised in or considered by the courts below, and it may be doubted whether this Court will entertain it. *Zellerbach Paper Co.* v. *Helvering* (1934) 293 U. S. 172, 182.

In any event, the argument from the Rules of Decision Act[1] and from *U. S.* v. *Thompson* (1878) 98 U. S. 486, is a *non sequitur*. Upon analysis of Mr. Justice Swayne's opinion, which cites the classic authorities on the rule *nullum tempus*, it is perfectly clear that the ground of his decision was the exemption of the enacting sovereign from the laws of Parliament or of Congress, as set forth in the *Magdalen College* case (1616) 11 Co. Rep. 66b, 74b and in *U. S.* v. *Hoar*, Fed. Cas. No. 15,373 (1821) at p. 330.[2] The restriction of this principle to the enacting sovereign is well established. *U. S.* v. *California* (1936) 297 U. S. 175, 186, where indeed the United States contended for such a construction (page 178).

It is true that the Court also gives other reasons for its conclusion. It says that the exemption of the United States

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[1] 28 U. S. Code, Section 725, R. S. Section 721, our main brief, page 92.

[2] Mr. Justice Story said:

"It appears to me * * * to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them (98 U. S. at 490). This statement is accurate. The exemption of the local sovereign from its own enactments (or those of the States subordinated to it by the Constitution) rests upon considerations of power, as Mr. Justice Holmes pointed out in *Kawananakoa* v. *Polyblank* (1907), 205 U. S. 349, 353, quoted at pages 61-2 of our main brief. Mr. Justice Swayne also said that, if the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions (98 U. S. at 490). This statement also rests upon considerations of power, i.e. the doctrine that the sovereign is omnipotent and that action against it without its consent is a logical impossibility.

The error of the respondent consists in attempting to extend these propositions. It consists in arguing that they apply equally to foreign sovereigns (brief, p. 52). This is not the case. So far as concerns considerations of power, either the States or the Federal government could authorize action against foreign sovereigns to the extent that they or their property are within the jurisdiction. The immunity of foreign sovereigns is predicated, not upon considerations of power, but upon considerations of expediency and of implied good faith between nation and nation. *The Exchange* (1812) 7 Cranch 116, quoted by respondent at pages 69-70. Chief Justice Marshall expressly points out (7 Cranch at 146) that the sovereign of the place has the power to impose its jurisdiction upon the visiting foreign sovereign.

Hence respondent is guilty of a false syllogism in seeking to extend to foreign sovereigns the language and the decisions of this Court in *U. S.* v. *Thompson*, 98 U. S. 486 and like cases. There is no parity between the domestic sovereign in his own territory and foreign sovereigns visiting there, as is abundantly shown by the instances of discrimination between them given in our main brief (pp. 58-60).

If we had taken over from English precedent the prerogative of fish royal, which Bracton treats in the same paragraph with the privilege of *nullum tempus* (our main brief, p. 14), it would not be claimed that the King of England, upon visiting our shores, could have our whales.

So with the argument *ab inconvenienti* (respt.'s brief, pp. 52, 63, 116-7). That argument is predicated by *U. S.* v. *Thompson*, 98 U. S. 486, 491, upon "the constitutional relations of the head and the members". An argument drawn from the relations of the Federal government to the State governments, all sharing the domestic sovereignty, cannot be extended to the relations of the Federal government with foreign sovereigns, even though the Federal government has exclusive control of foreign relations.[1] Our jurisprudence when the rights of our nationals are in question, is not affected by arguments *ab inconvenienti* directed to the interests of foreign sovereigns. The "public rights, revenue, and property" of which Mr. Justice Story spoke in *U. S.* v. *Hoar* (respt.'s brief, p. 53) are quite obviously the rights, revenue and property of the local sovereign only.

The general principle is thoroughly established that a foreign sovereign resorting to a municipal forum is bound by its canons of justice and rules of procedure. No reason appears why the rules so applied to him should not include the statute of limitations, i.e. the requirement that, if he desires the remedies of the forum, he must invoke them while the evidence is fresh. Manifestly, it seems to us, the Rules of Decision Act contemplates the application of State laws in such cases. Neither the Constitution nor any treaty or statute of the United States otherwise requires or provides. The fact that the States are prohibited from acting or interfering with foreign relations has no bearing. It is patent

[1] The impossibility of respondent's contentions on this point is perhaps most graphically shown by substituting the word "Russia" wherever the words "United States" appear in Mr. Justice Swayne's opinion in *United States* v. *Thompson*.

that the regulation by States of their own rules of procedure and the requirement that foreign states resorting to their courts accept such rules on a plane with private litigants, are not an interference with foreign relations. The opinion in *U. S.* v. *Curtiss-Wright Corporation*, 299 U. S. 304, 318 (1936), makes clear that the foreign relations of which the Federal government has exclusive cognizance are foreign relations in the strict or political sense of the term; i.e. the conduct of external affairs on behalf of the whole nation, as by the acquisition of territory, the making of international agreements, and the like. The Federal power over external affairs is in origin and essential character different from that over internal affairs. 299 U. S. at 319. Considerations applicable to the conduct of international relations cannot, therefore, be extended into the forum which the State of New York maintains for the adjudication of controversies that may be brought there, by foreign sovereigns or others.[1]

In *U. S.* v. *Nashville etc. R. Co.*, 118 U. S. 120, which involved the operation of a State statute of limitations upon bond coupons acquired by the United States under a treaty with the Chickasaw Indians, the bar of limitations did not arise because the period had not run when the United States acquired the coupons. From the opinion it is clear, however, that this Court saw no conflict between the treaty and the State statute, and would have applied the statute under the Rules of Decision Act if the period had run.

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[1] The cases cited by respondent themselves make this point clear. In *Henderson* v. *Mayor of New York* (1875), 92 U. S. 259, which involved a statute of New York regulating foreign shipping, the Court at page 273 pointed out that the statute

> "belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments."

U. S. v. *Rauscher* (1886), 119 U. S. 407, dealt with the international rendition of fugitives, as to which the Court said at page 414

> "that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers."

To attempt to subsume the statute of limitations and other procedural rules of the state when applied to a foreign sovereign plaintiff, under the rule applicable to taxes on foreign commerce and the negotiation of extradition treaties, is to lose sight of the whole issue in this case.

B. The New York Statute of Limitations Binds Foreign Sovereigns.

It is true that the New York statute does not in terms mention foreign sovereigns. The argument from that fact that foreign sovereigns are therefore exempted from the terms of the statute is, as we have shown, a wholly unjustified extension of the principle that the *enacting* sovereign is exempt from the application of his own statutes. Even the enacting sovereign has sometimes been bound by his statutes although not named. *U. S.* v. *Knight*, 14 Pet. 301 (1840); *Fink* v. *O'Neil*, 106 U. S. 272 (1882); *U. S.* v. *Harpootlian*, 24 F. (2d) 646 (C. C. A. 2, 1928).

The argument that, because among the sovereigns not named in the New York statute is the United States, and the United States is exempt from limitations, therefore foreign sovereigns not named in the statute are also exempt (respt.'s brief, p. 58) has been shown to be a *non sequitur*. Foreign sovereigns are not named in the New York statute providing for security for costs, yet are bound thereby. *Republic of Honduras* v. *Soto* (1889), 112 N. Y. 310. They are not named in the Federal Equity rules relating to counterclaims, yet are bound thereby. *U. S.* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2, 1936), certiorari denied 299 U. S. 563.

Respondent cites New York Civil Practice Act §977-b (brief, p. 55) in disregard of the fact that, in so far as it applies to nationalized former Russian corporations, this section is an interference with the title to their property which on respondent's theory was three years previously as-

signed to the United States by the Soviet Government.[1] In *Tillman* v. *National City Bank and Guaranty Trust Company*, 276 N. Y. , decided January 11, 1938, the validity of subdivision 18 in so far as it sought to extend the statute of limitations in respect of a debt already barred, was challenged by defendant-respondent. The Court of Appeals gave judgment for defendant-respondent, but without opinion.

In discussing the reason of the rule *nullum tempus*, respondent goes so far as to argue that that reason applies equally to local and foreign sovereigns (brief, pp. 61-3), although conceding that the modern basis of the rule, which gives it vitality at present, is the public policy that public rights or interests shall not be lost or diminished by the failure of officials to assert them properly (respt.'s brief, p. 61). Respondent's discussion of this subject turns on an ambiguous use of the word "public". It is perfectly apparent from the evolution of the *nullum tempus* rule (petr.'s brief, pp. 14-23) that every court which has exempted the local sovereign from limitations out of consideration to the public interests, meant thereby the interests of the local sovereign. The interests of the local sovereign are the only "public" interests which concern any particular forum.

This distinction appears, among other things, from the language of this Court in *French Republic* v. *Saratoga Vichy Spring Co.*, (1903) 191 U. S. 427, 437; of the Supreme Court of Appeals of West Virginia in *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 329 (1887); and of Circuit Judge

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[1] This statute was approved June 8, 1936. Subdivision 1 gives the general scope of the provision: "1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business, whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise."

Barr in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 F. 533, 536 (1891). The respondent's attempted distinction of that class of cases (brief, pp. 73-5) leaves intact the striking fact that the courts, in discussing the right of a foreign sovereign to exemption from limitations, do not treat such right as *a local public interest* but reduce it to the footing of a private claim. The West Virginia Court, in denying the State of Virginia the benefits of *nullum tempus*, applies exactly the reasoning of this Court in denying the the State of Georgia exemption from Tennessee's exercise of eminent domain. *Georgia* v. *Chattanooga* (1924), 264 U. S. 472, 480; *State of Pennsylvania* v. *Wheeling Bridge Co.* (1851) 13 How. 518, 561.

The contention that because all governments are so conducted that the exemption from the statute of limitations is most useful and necessary in the protection of public rights (respt.'s brief, pp. 61, 62), the local sovereign must therefore admit foreign sovereigns to the benefit of such a policy, both begs the question and disregards the rationale of the exemption itself. Respondent seems to concede that the dictum "applicable to all governments alike" (brief, p. 62) is, as we have shown (petr.'s brief, pp. 28-32), merely justification for translating to a republican system part of the royal prerogative. The suggestion (brief, p. 62) that the United States, if it desires not to be barred in suits in foreign courts, should apply a uniform rule to the same effect in favor of foreign sovereigns, signally overlooks the fact that, so far as research goes, all foreign countries would subject the United States to the status of a private litigant with respect to limitations or other matters. See Appendix II to petitioner's brief, pages 96-116, particularly the responses of the Belgian Minister of Justice and the law faculty of the University of Berlin in the *Zappa* case (pp. 98, 107); *Dame de Latude* v. *S. S. Leon XIII* (p. 106); and *Inscription de bienes raices del Gobierno de Bolivia* (p. 100).

It is fatal to respondent's argument upon a desired equality of states in respect to this exemption, that such an ex-

emption would apparently be accorded to the United States as plaintiff in no other country. Respondent contests our interpretation of foreign law on this point (brief, pp. 76-8, Appendix, pp. 108-15). In order not to over-extend the argument, we shall deal only with the two countries as to which respondent specifies. *First*, as to the *Aguado* case. Respondent calls to our attention the fact that the case went to the Court of Cassation and that that Court rejected the claim of immunity of the Spanish Government from limitations on the ground that it was there asserted for the first time. The report shows that the Spanish Government claimed "that the Spanish law alone should regulate the duration of a right of action belonging to the state." As to this the editor of the reports (Journal du Palais, 1869, p. 118), says: "But it seems to us that this argument could not apply in our situation where there was involved, not a foreign government sued by a Frenchman, but rather a Frenchman sued by a foreign government: in the latter case, the jurisdiction of the French courts appears not to be doubtful under the terms of Code Napoleon, Article 15. See Demangeat, *Traité de Droit International* Vol. 1, page 420, Bonfils, *De la Competence des tribunaux francais,* n. 131." Moreover the Court of Cassation pointed out that the Spanish Government did not claim that under Spanish law "the period of prescription was greater than that under French law". In fact the extreme limit of prescription at the time of the decision under Spanish law for that type of action, was twenty years. *Novisima Recopilacion,* Book XI, Tit. 8 Law 5, enacted in 1805. The claim in the *Aguado* case was hence barred under Spanish law, just as the claim of the State of Russia here was barred both under the ten-year limitation of Imperial Russian law (petr.'s main brief, p. 111) and under the three-year limitation of Soviet Russian law (petr.'s main brief, p. 112) by the running of more than thirteen years between petitioner's repudiation in 1918-20 and the assignment to the United States in 1933.

Second, the respondent disputes our interpretation of Soviet law with respect to the operation of extinctive prescription (limitations) against the state. It being admitted (respt.'s brief, p. 111) that the Soviet statute runs against a claim of the Soviet Government when it acts in a proprietary capacity, the conclusion is obvious that a suit of the United States in Russia to recover a bank deposit would be held to be a suit in a proprietary capacity subject to limitations. See among the many authorities elsewhere cited by us *King of Spain* v. *Hullett*, 7 Bligh N. S. 359, 392; *Georgia* v. *Chattanooga*, 264 U. S. 472.

Third, the argument of the Spanish Government in the *Aguado* case suggests the possibility that in an action in a foreign court the United States might claim to be entitled to the benefits of its own law with respect to limitations, including the benefits of the rule *nullum tempus*. *Smith* v. *Weguelin* (1869) L. R. 8 Eq. 198. Over and above the universal line of authority which would be invoked to rebut any such claim, it may be noted that the doctrine of *Smith* v. *Weguelin* has been sharply restricted if not overruled. *Rex* v. *International Trustee for the Protection of Bondholders* [1937] A. C. 500, 530-1.

In view of the fact that the rule *nullum tempus* is so universally put upon the ground of public policy, an acid test of respondent's theory would be whether the specifically public and governmental rights of a state can be enforced in the courts of another. Some of them, such as the right to state property, can be so enforced as a matter of comity or favor. Others relating to the exercise of functions more especially governmental, cannot be enforced in the courts of foreign countries. Into this class fall tax and penal laws, which cannot be given extra-territorial effect. The consideration which is decisive on the question whether a law is a penal law in the international sense so that it cannot be en-

forced in the courts of another state, is whether its purpose is to punish an offense against the public justice of the state. *Huntington* v. *Attrill* (1892) 146 U. S. 657, 673-4; *Huntington* v. *Attrill* [1893] A. C. 150, 157.

The fact that the ascertainment of a foreign public interest in a statute prevents it from enforcement here is a final conclusive indication that the public policy basis of the rule *nullum tempus* is strictly territorial in its extent.[1]

C. Respondent's Dilemma Between an Inequitable Rule and Applying the Doctrine of Laches to Foreign Sovereigns.

The monstrous possibility opened by the decision of the Circuit Court of Appeals that foreign sovereigns may sue American nationals in respect of all their transactions, without limitation of time, is certainly not in the interest of a sound public policy. It is not agreeable, even in jest, to contemplate an action by the King of England to replevy from some New England museum powder horns negligently left by the servants of his royal ancestor on the field of Bunker Hill. Respondent realizes that there must be some restriction in the matter of time upon the actions of foreign states against American citizens. Employing the analogy of reclamations in international tribunals, which apply the doctrine of laches although bound by no statute to do so, respondent suggests (brief, pp. 65-7) that the doctrine of laches

> "provides the only fair and equitable limitation on the sovereign's claim."

Respondent overlooks the fact that, under the rule of *nullum tempus*, the local sovereign is exempt from the application of laches as well as from that of limitations, and upon the

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[1] It is significant that in *United States* v. *Thompson*, 98 U. S. 486, 491 (1878), the Court said with reference to the maxim *nullum tempus* "The doctrine is alike applicable to civil and criminal actions".

same grounds. This Court said in *U. S.* v. *Insley* (1889), 130 U. S. 263, 266:

> "This doctrine [of *nullum tempus*] is applicable with equal force, not only to the question of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity."

To the same effect are *Smith* v. *U. S.*, 5 Pet. 292, 298 (1831); *Gibson* v. *Chouteau*, 13 Wall. 92, 99 (1871); *Armstrong* v. *Morrill*, 14 Wall. 120, 145 (1871); *Minturn* v. *U. S.*, 106 U. S. 437, 444, (1882); *U. S.* v. *Nashville etc. R. Co.*, 118 U. S. 120 (1886); *U. S.* v. *Beebe*, 127 U. S. 338, 344 (1888); *U. S.* v. *Mack*, 295 U. S. 480, 489 (1935).[1]

Respondent is therefore reduced to the necessity, either of conceding that upon its theory foreign sovereigns are subject to no limitation of time in any forum of this country and have not been since 1776, or of conceding that its theory is mistaken to the extent that foreign sovereigns are at least subject to laches. If that concession once be made, the theory breaks down entirely.

D. The Doctrine of Sovereign Immunity is Wholly Irrelevant.

Respondent argues at great length (brief, pp. 67-82) that sovereign immunity requires exemption from limitations of a foreign sovereign plaintiff. The connection between these propositions escapes us. The doctrine of immunity, as we have shown (main brief, p. 58), proceeds on the theory of an implied waiver of jurisdiction by the local sovereign conferring a license upon the foreign sovereign to come in with exemption from the jurisdiction, while the application to the

[1] Furthermore courts of equity often follow the analogy of the statute of limitations in finding laches or treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar. *Hayward* v. *National Bank*, 96 U. S. 611, 617 (1877); *Willard* v. *Wood*, 164 U. S. 502, 520 (1896).

foreign sovereign of the procedural rules of the forum, when the foreign sovereign or his claim are put in suit here, proceeds on the reverse theory of implied consent. There is no conflict between these theories. The requirement of security for costs or for judgment on the counterclaim, or the defense of limitations or contributory negligence can be applied against a foreign sovereign plaintiff in entire consistency with the principle which grants him immunity so long as he does not invoke the jurisdiction. The fact that a foreign sovereign plaintiff may be subjected to burdens to which the local sovereign is not subjected, and denied privileges which the local sovereign has (petr.'s main brief, pp. 58-9) shows the fallacy of the theory of equality among sovereigns to which respondent appeals.

The numerous precedents reducing the foreign sovereign plaintiff to the status of a private litigant (petr.'s brief, pp. 35-44) constitute a clear and unquestioned rule. Respondent has no comment to make thereon, except to say that the ordinary procedural rules to which the sovereign is thus subjected are "designed to facilitate its enforcement of its rights" and to secure an examination of its claims upon the merits (brief, p. 73). Obviously this is not so. It can hardly be said that the entertainment of a cross-claim against a sovereign, or the requirement of security for an affirmative judgment, or the allowance of the defense of contributory negligence, are designed to *facilitate* the examination of his claim. Such defenses against the foreign sovereign are designed purely and simply to insure the rendition of justice between the parties. The statute of limitations, requiring that the claim be put in suit while the evidence is fresh, is a rule of that kind. *U. S.* v. *Oregon Lumber Co.*, 260 U. S. 290, 299 (1922). The rule of limitations and laches as constituting a doctrine of repose and an assurance of peace is one of high public interest. The authorities in municipal and international law are collected at pages 45-51 of our main brief, and are not indeed seriously questioned by the respondent (brief, p. 75).

Moreover, respondent's suggestion that, in submitting to a municipal forum, the foreign sovereign might be deemed to submit to some rules (supposed to facilitate the examination of its claim upon the merits) and not to submit to others (not supposed to facilitate such an examination) (brief, p. 73) is obviously untenable. The foreign sovereign and his claim are either wholly submitted to the jurisdiction of the New York court or not submitted at all. They cannot be partly submitted. They cannot be submitted with respect to rules which the foreign sovereign likes and withheld as to rules he does not like. The operation of the statute of limitations under the rule of *Tillman* v. *Guaranty Trust Company*, 253 N. Y. 295 (1930) is automatic and not dependent upon the volition of the owner of the cause of action accrued, even though it may not be applied to such cause of action until the same has been put in suit.

The explanation attempted by respondent (brief, pp. 73-5) of the four cases in American jurisdictions which support the application of limitations to foreign sovereigns, by no means removes them from respondent's path. The fact cannot be obscured that, in holding that the foreign sovereign plaintiff is subject to the statute of limitations of the forum, both *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 329[1], and *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 F. 533, 536, applied exactly the distinction contended for by the petitioner in this case, applied by the District Court below (R. 271-2), and suggested by this court in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437. The courts in those two cases were not deterred from their conclusion by considerations of the kind which

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[1] The fact that the controversy was between states of the Union which are not nations either as among themselves or in respect of foreign nations (respt.'s brief, p. 74) is immaterial. The states of the Union have equal rights as against each other, and are accorded sovereign immunity in this Court. *Wisconsin* v. *Pelican Insurance Company* (1887), 127 U. S. 265, 288; *Hands* v. *Louisiana* (1890), 134 U. S. 1, 15; *Louisiana* v. *Texas* (1900), 176 U. S. 1, 15; *U. S.* v. *Minnesota*, 270 U. S. 181, 195 (1926).

respondent sets up in this Court; in other words it made no difference that the State of Virginia enjoyed sovereign immunity as regards West Virginia, or that the governmental units involved in those cases were not named in the respective statutes of limitations (cf. respt.'s brief, p. 58). There is no escaping the fact that in *Royal Italian Government* v. *International Committee of YMCA*, 273 N. Y. 468 (1936), the New York court applied the statute of limitations to a foreign sovereign.

Non-existence of any immunity. Respondent too easily assumes that the bank deposit the subject of this action was entitled to sovereign immunity. Though the question need not be decided, it may be noted that any such conclusion is highly doubtful. The deposit was not, as respondent states (brief, p. 78), part of the proceeds of a public loan, but was the proceeds of a payment made by Mr. Ughet into the account with petitioner after the proceeds of the public loan were exhausted (R. 80; cf. respt.'s brief, p. 4). With respect to this account, banker and depositor held the ordinary relations of debtor and creditor, as was pointed out in *Kingdom of Roumania* v. *Guaranty Trust Company*, 250 F. 341, 345, certiorari denied 246 U. S. 663, which respondent cites. An attachment on the debt could no doubt be quashed upon a proper showing; but such a showing would involve either an intervention by the Ambassador or a suggestion by the Ambassador supported by our political department acting through the Attorney General. *Compania Española de Navegacion Maritima S.A.* v. *SS. Navemar*, No. 242, October Term 1937, decided January 31, 1938; *Ex Parte Muir* (1921), 254 U. S. 522, 532-3; *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 F. (2d) 705, certiorari denied 275 U. S. 497, and see L. Hand, D. J., in 300 F. 891, affirmed 32 F. (2d) 195. In the cases as to sovereign immunity upon which respondent relies, the immunity was effectively asserted by the sovereign in one of these two ways, usually through the political department of the government of the forum. *In the*

instant case no such immunity was ever asserted. Neither a suggestion supported by the State Department nor a legal proceeding was ever filed by the Ambassador, despite the fact that he knew the petitioner's set-off had been taken (R. 56). If he had sued, he would have been met by the set-off; the foreign sovereign's claim of a debt from the petitioner would have been contested; and the existence of any property entitled to sovereign immunity might never have been established. This issue the Ambassador deliberately postponed until the statute of limitations had run. Thus the possession in the foreign sovereign necessary to exclude judicial interposition (*The Davis*, 10 Wall. 15, 21) never existed. In such circumstances it is highly doubtful whether any property legitimately the subject of sovereign immunity can be regarded as having existed.

E. As to the Alleged Lack of Power to Bind a Foreign Sovereign by a Statute of Limitations.

It is argued that the State of New York lacks power to bind a foreign sovereign by the statute of limitations (respt.'s brief, pp. 79-82), on the supposed ground that the United States is our sole international sovereign charged with international rights and obligations and that the application to a foreign sovereign plaintiff of a municipal statute of limitations somehow invades this exclusive power. The baselessness of this contention has already been shown (pp. 30-3, 39-43 above). No question of sovereign immunity is involved, the operation of State law upon the sovereign being conditioned upon the submission of his claim to litigation in a municipal court. The regulation of foreign relations is in no way involved in or interfered with by the application of State procedure to a foreign sovereign plaintiff. The cases cited by respondent in this connection (brief, pp. 80-1) are instances of active interference by the States in foreign commerce or in extradition proceedings, which sharply illustrate the irrelevance of the principles involved to the situation

here presented. The enactment and application of the laws under which actions shall be conducted in the State courts is not a "field of national activity" (respt.'s brief, p. 82) in which the Federal constitutional scheme requires uniformity. Did the State of New York interfere with the conduct of foreign relations when it exacted security for costs of a foreign sovereign plaintiff in *Republic of Honduras* v. *Soto*, 112 N. Y. 310? The question answers itself.

In *Blythe* v. *Hinckley* (1901) 180 U. S. 333, this Court dealt peremptorily with the theory which respondent here advances. That case involved the question whether an alien could inherit land in the State of California. The contention was made that in the absence of treaty between the United States and the alien's country on that subject, California had no power to legislate thereon, and that the statute of California assuming to permit the alien to take property there was an encroachment upon the treaty power. Referring to *Geofroy* v. *Riggs*, (1890) 133 U. S. 528 the Court said at page 340:

> "But there is no hint in that case that in the absence of any treaty the State itself could not legislate upon the subject and permit aliens to hold property, real and personal, within its borders according to its own laws. This court has held from the earliest times in cases where there was no treaty that the laws of the State where the real property was situated governed the title and were conclusive in regard thereto."

The Court also said at page 340 with reference to the type of contention advanced by respondent:

> "Plaintiff urges that never before has the question been directly passed upon by this court. If he means that it has never heretofore been asserted, that in the absence of any treaty whatever upon the subject, the State had no right to pass a law in regard to the inheritance of property within its borders by an alien, counsel may be correct. The absence of such a claim is not so extraordinary as is the claim itself."

IV. As to the alleged revival of the barred claim in the hands of the United States (Respt.'s brief, Part Three, pp. 82-90).

Respondent's contention that by the assignment of the barred claim of the State of Russia to the domestic sovereign, the United States, it was somehow subjected to a revivifying bath and emerged as a live and enforcible claim, is no less than respondent's other propositions decisively contradicted by the authorities. *United States* v. *Buford* (1830) 3 Pet. 12, 29; *The King* v. *Morrall* (1818) 6 Price 24; *U. S.* v. *Nashville etc. R. Co.* (1885) 118 U. S. 120, 125 (dictum); *United States* v. *White*, 2 Hill 59, 61 (N. Y. 1841); *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade*, 48 T. L. R. 37 (1931). In *United States* v. *Buford*, the point was thought to be beyond argument, and that case is cited in the opinion of the Circuit Court of Appeals in this action (R. 282; 91 F. [2d] at 899) without any question as to its authority.

A. Under the Federal Rules of Decision Act a State Statute of Limitations is made Applicable to a Law Action by the United States in the Federal Courts as Assignee of a Claim which has Already Been Barred by the State Statute of Limitations.

In *United States* v. *Buford* the United States sought to enforce a claim barred by the Kentucky statute of limitations in the Federal District Court located in Kentucky. In holding that the action on the part of the United States was barred by the Kentucky statute of limitations, even though suit was brought in the Federal courts, the Supreme Court necessarily held that the Kentucky statute of limitations was made applicable in such a suit by the Federal Rules of Decision Act of September 24, 1789, c. 20, § 34, 1 Stat. 92, from which the present Rules of Decision Act (28 U. S. C. § 725, R. S. § 721) is derived.

It is significant that the United States Government in that case made the same argument that the respondent does here, and even cited the same authority as that which the respondent advances at page 83 of its brief. There the Government is reported to have argued (3 Pet. at p. 21):

> "The statute of limitations of Kentucky is not a bar to the suit of the United States. The United States vs. Hoar, 2 Mass. [sic] Rep. 311."

Here the respondent asserts (brief, p. 83):

> "Even assuming that the state statute might apply to a foreign sovereign, still it cannot apply to this action in which the United States is the plaintiff. *United States* v. *Thompson*, 98 U. S. 483; *United States* v. *Hoar*, 2 Mason 311, 26 Fed. Cas. p. 329, No. 15,373 * * *."

In the later case of *United States* v. *Nashville, etc. R. Co.*, 118 U. S. 120, 125 (1886), this Court said with reference to the applicability of the statute of limitations of Tennessee in a suit instituted in the Circuit Court of the United States for the Middle District of Tennessee:

> "They [the United States] take such paper subject to all the equities existing against the person from whom they purchase at the time when they acquire their title; and cannot therefore maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the statute of limitations. *United States* v. *Buford*, 3 Pet. 12, 30; *The King* v. *Morrall*, 6 Price, 24."

Similarly in all cases where the United States is suing in a proprietary and not a sovereign capacity, or when it is suing on behalf of individuals and not on behalf of the public, it has been consistently subjected to the respective State statutes of limitations, made applicable in such an action by the Rules of Decision Act. *United States* v. *Beebe*, 127 U. S. 338 (1888). See *Cooke* v. *United States*, 91 U. S. 389, 398 (1875); *Wilber National Bank* v. *United States*, 294 U. S. 120, 124 (1935).

B. The Remedy of the United States Is Barred by the New York Statute of Limitations.

The argument that the remedy of the United States is not barred, even though the claim in suit was barred prior to its assignment to the United States (respt.'s brief, pp. 85-90), appears to be staked on the single proposition that the statute of limitations of Kentucky, involved in the decision of *United States* v. *Buford*, unlike the present New York statute of limitations, extinguished the right on a contract claim and did not merely bar the remedy. In fact, however, there is no substantial distinction between the present New York statute of limitations and the Kentucky statute of limitations in force at the time when *United States* v. *Buford* was decided in so far as their respective effects on contract claims are concerned. Both statutes stem from the English Limitation Act, 1623, 21 Jac. 1, c. 16, § 3, are closely modelled thereon, and all three statutes are substantially similar in their operation on contract claims.[1]

In *Bell* v. *Morrison*, 1 Pet. 351 (1828), the principal case relied upon by respondent in its attempted distinction of the Kentucky statute of limitations on contract claims, Mr. Justice Story said (p. 359):

> "The statute of limitations of Kentucky, is substantially the same with the statute of 21 of James, ch. 16, with the exception, that it substitutes the term of five years, instead of six."

As with the English statute[2] and the New York statute,[3] the Kentucky statute of limitations, as construed by the highest courts of Kentucky about the year 1830[4] barred

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[1] The texts of these three statutes are set forth in Appendix III, page 9 below.

[2] *Wainford* v. *Barker*, 1 Ld. Ryam. 232 (1697); *Courtenay* v. *Williams*, 3 Hare, 539, 551 (1844); *Poole* v. *Poole*, 7 Ch. App. 17 (1871). See also XX Halsbury's Laws of England (2d Ed.) page 602.

[3] *Lightfoot* v. *Davis*, 198 N. Y. 261, 224 (1910).

[4] The year of the decision in *U. S.* v. *Buford*, 3 Pet. 12.

the remedy only on a contract claim and did not extinguish the obligation of the contract, as the respondent mistakenly asserts (brief, pp. 87-90). *Graves* v. *Grave's Executor*, 2 Bibb 207, 208-9 (Ky. 1810); *Smart* v. *Baugh*, 3 J. J. Marsh. 363 (Ky. 1830). See also *Davis* v. *Ballard*, 1 J. J. Marsh. 563, 573, 580 (Ky. 1829). In *Graves* v. *Grave's Executor*, the Court of Appeals of Kentucky said, in holding that the statute of limitations of the forum should govern in an action on contract (2 Bibb at 208-9):

> "The statute of limitations does not affect the validity of the contract, but the time of enforcing it: or, in other words, it does not destroy the right but withholds the remedy. It would seem to follow, therefore, that the *lex fori*, and not the *lex loci* was to prevail with respect to the time when the action should be commenced."[1]

In *Smart* v. *Baugh*, 3 J. J. Marsh 363, 367 (1830), the Kentucky Court of Appeals dealt with a case of acquisitive prescription based upon adverse possession of a slave, and then distinguished extinctive prescription as follows:

> "But it is not so in debt, because the statute of limitations does not destroy, nor pay the debt. This has been abundantly established by authority since the time of Holt.[2] A debt barred by time is a sufficient consideration for a new asumpsit. The statute of limitations only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; and the privilege can only be asserted by plea."[3]

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[1] This statement continued to be the law of Kentucky long after the decision of *United States* v. *Buford* in 1830. *McArthur* v. *Goddin*, 75 Ky. 279 (1876); *Bennett* v. *Devlin*, 56 Ky. 353 (1856).

[2] In *Draper* v. *Glassop*, 1 Ld. Raym. 153 (cir. 1789), Holt stated that the statute of limitations might be given in evidence under the plea *nil debet*. The Kentucky court disagreed with this statement of Holt because, under Kentucky law, the debt remained even though barred by the statute of limitations (p. 366).

[3] See also to the same effect, *Smart* v. *Johnson*, 3 J. J. Marsh, 373 (Ky. 1830).

This opinion was cited with approval and quoted at some length by this Court in *Campbell* v. *Holt*, 115 U. S. 620, 624-5 (1885), for the proposition that the statute of limitations does not extinguish the debt but merely bars the remedy of the creditor.[1]

Respondent's only argument on this point, indeed, seems to be based upon the fallacious contention that the present New York statute of limitations differs from the statute of Kentucky underlying *U. S.* v. *Buford* with respect to tolling of the statute by new promises or acknowledgments (brief, pp. 87-9). But the Kentucky cases discussed in *Bell* v. *Morrison*, 1 Pet. 351 (1828) and those mentioned by respondent (brief, p. 87n) show merely a refusal to follow certain early decisions of the English courts whereby virtually any communication or action on the part of the debtor was held to toll the statute of limitations. These cases establish no material divergence between the law of Kentucky at the time and that of England and New York today on the same subject.

As to the English law see Lord Sumner's opinion in *Spencer* v. *Hemmerde* [1922] 2 A. C. 507, 519-36. The same confusion existed in the State of New York in the first half of the nineteenth century, as is clearly illustrated in the *obiter* discussion of the subject, in *Henry* v. *Root*, 33 N. Y. 526, 528-536 (1865) which is the most recent New York authority cited by the respondent (brief, pp. 88-9) on this particular subject. In holding that there was sufficient evidence to

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[1] *Campbell* v. *Holt*, it should be remembered, is one of the leading cases holding that, inasmuch as the statute of limitations bars the remedy only and does not discharge the debt, the legislature of a State may extend the period of limitations on contract claims even after the statute bar has fallen. It is significant that the New York Court of Appeals has expressly refused to accept either *Campbell* v. *Holt*, or the dictum in *Hulbert* v. *Clark*, 128 N. Y. 295, 297 (1891), upon both of which the respondent relies, as establishing the law of that State (brief, pp. 84-5). See *Hopkins* v. *Lincoln Trust Company*, 233 N. Y. 213, 215 (1922), *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 276-7 (1924); cf. *Tillman* v. *National City Bank of New York*, 276 N. Y. —, decided January 11, 1938.

establish the fact that the defendant on coming of age, had affirmed a contract entered into during his period of infancy, Davies, J., reviewed New York authorities on the tolling of the statute of limitations and concluded, despite conflicting decisions, that the creditor should recover on the old promise rather than the new one. *Henry* v. *Root* has seldom been referred to since by the New York Court of Appeals, and does not represent the present law of the State on the tolling of the statute of limitations by acknowledgment or new promise. In the most recent decision by the New York Court of Appeals on that subject it was held that part payment by the maker of the note would not extend the period of limitations against a guarantor on the note. *Peoples Trust Co.* v. *O'Neil,* 273 N. Y. 312 (1937). Hubbs, J. stated (p. 316):

> "An action on a contract brought after six years from its due date *must be brought on the new promise,* express or implied, which operates to take the claim out of the statute" (Italics ours).

See to the same effect *Brooklyn Bank* v. *Barnaby,* 197 N. Y. 210, 220, 225 (1910); *Schutz* v. *Morette,* 146 N. Y. 137, 143 (1895); *Butler* v. *Johnson,* 111 N. Y. 204, 212 (1888); *Shoemaker* v. *Benedict,* 11 N. Y. 176, 183-4 (1854).

Thus the New York courts follow the precise holding of this Court in *Bell* v. *Morrison,* 1 Pet. 351 (1828), based upon the Kentucky statute of limitations, that a new promise or acknowledgment of the debt by one partner, after the dissolution of the partnership, will not revive the debt as to the other partners or as to the company. *Van Keuren* v. *Parmelee,* 2 N. Y. 523, 533 (1849); *Harper* v. *Fairley,* 53 N. Y. 442, 445, (1873). So, also, as in Kentucky (*Head's Executor* v. *Manners' Adm'rs,* 5 J. J. Marsh. 255 (1831), cited by respondent at page 87n) the New York court holds that an executor cannot revive a claim against the estate by mere acknowledgment, but can only do so by an express

promise. *Schutz* v. *Morette*, 146 N. Y. 137 (1895); *McLaren* v. *McMartin*, 36 N. Y. 88 (1867); *Bloodgood* v. *Bruen*, 8 N. Y. 362 (1853). Similarly one joint obligor cannot revive the joint claim but can only subject himself to liability by a new promise or acknowledgment. *Peoples Trust Co.* v. *O'Neil*, 273 N. Y. 312 (1937) and cases there cited.[1]

United States v. *Buford*, therefore, cannot be explained away by the respondent as a special case.[2] On the contrary it merely applies the fundamental law of assignments that the assignee is subject to any defenses or equities that the debtor was free to assert against the assignor. The case has been frequently cited for this broad proposition. *United States* v. *Bank of New York & Trust Co.*, 77 F. (2d) 866, 869 (C. C. A. 2, 1935), affirmed 296 U. S. 463; *United States* v. *Belmont*, 85 F. (2d) 542, 543 (C. C. A. 2, 1936), reversed on other grounds 301 U. S. 324; *U. S. ex rel. Skinner & Eddy* v. *McCarl*, 8 F. (2d) 1011 (C. A. D. of C. 1925); *The Falcon*, 19 F. (2d) 1009, 1013 (D. Md. 1927); *In re Cooke* 19 Fed. 88, 94; *Hildebrand* v. *Kinney*, 172 Ind. 447 (1909). Indeed this broad doctrine is so firmly established in the general law that it is frequently applied without the citation of specific authority. It has been so applied with reference to the very Litvinoff assignment here invoved. *United States* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2, 1936), cert. den. 299 U. S. 563; *United States* v. *President and Directors of The Manhattan Company*, 276 N. Y. 396, 406-7 (1938); *United States* v. *Belmont*, 301 U. S. 324, 335 (1937).

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[1] New York Civil Practice Act §59 speaks of an acknowledgment or promise in writing which tolls the statute of limitations as evidence of a "new or continuing contract". In this respect the New York statute is in accord with the general trend of American law. Angell on Limitations (6 ed) pages 240-1; Restatement, Contracts §§86, 91.

[2] We need only notice in passing that the excerpt from the reported argument in the case (respt.'s brief, p. 33n) relates to a distinct and collateral issue having nothing to do with the effect of the assignment to the United States of a barred claim; viz. the issue whether the trial court erred in refusing to permit an amendment after judgment had been rendered against the United States.

It has long been recognized that property or claims of a sovereign government, acquired as successor or transferee from another government, are subject to the same rights, obligations and defenses as in the hands of the old government.

> *United States* v. *Prioleau*, 2 H. & M. 558, 563 (1869);
> *United States* v. *McRae*, L. R. 8 Eq. 69, 75 (1869);
> *Voevodine* v. *Government of the Commander-in-Chief of the Armed Forces in the South of Russia*, 232 App. Div. (N. Y.) 204, 209 (1931).

This rule having been applied against the United States in the cases cited, it should as well, on respondent's theory of the equality of sovereigns, be applied against the State of Russia to which, under the Litvinoff assignment, the United States has undertaken to account for any recoveries.

Against this uniform course of decision respondent advances but one case, *South Dakota* v. *North Carolina*, 192 U. S. 286 (1904), a decision by a sharply divided court on an entirely distinct question. That case dealt, not with defenses against an assigned claim, but solely with the capacity of the State of South Dakota to sue the State of North Carolina in this Court on bonds issued by the latter. *United States* v. *Buford* involved such radically different issues that it was not even referred to in the opinion of a majority of the Court. And, although Mr. Justice White referred to the *Buford* case in his dissenting opinion by way of analogy and by way of analogy only, the majority, instead of overruling the *Buford* case *sub silentio* (respt.'s brief, p. 89), apparently saw no analogy in the *Buford* case whatever. The substance of the decision in the *South Dakota* case, it is submitted, is contained in the following two sentences at page 312:

> "Obviously that jurisdiction [of this Court in a suit by one state of the Union against another] is not affected by the fact that the donor of these bonds could not invoke

it * * * The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy."

No question of the statute of limitations was involved; indeed, the statute was not pleaded.

Subsequently in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934) this Court indicated that it is prepared to restrict rather than extend its decision in the *South Dakota* case. Leave to file a declaration in an original proceeding against the State of Mississippi for the recovery of the principal and interest of certain bonds issued by that State was denied to the Principality of Monaco, seeking recovery as transferee of the bonds. The *South Dakota* case was distinguished on the ground that it involved a suit between sister states and not a suit by a foreign state against a non-consenting state of the Union.[1] By unanimous decision, this Court held that it had no jurisdiction to entertain a suit brought by a foreign state against a state of the Union without her consent. At the conclusion of his opinion, the Chief Justice significantly observed (p. 332):

"We conclude that the Principality of Monaco * * * is in no better case than the donors of the bonds, * * *."

C. Upon the Circumstances of This Case Petitioner Has Vested Right in the Account.

The present case shows a *bona fide* claim of right by the petitioner to avail of its debt to the State of Russia in payment of losses which it sustained at the hands of that State, a claim of a property right in the deposit account openly and adversely maintained for twenty years. This claim of title was based on the common law right of set-off or banker's lien long judicially recognized. *Falkland* v. *St. Nicholas National*

[1] The defense of the statute of limitations and laches was interposed by the State of Mississippi, and those issues were argued (pp. 318-320) but were not discussed in the opinion of the Court.

Bank of New York, 84 N. Y. 145 (1881); *People* v. *St. Nicholas Bank*, 44 A. D. 313, 318-9 (First Department 1899); *Davis* v. *Bowsher*, 5 Term Rep. 488, 491 (1794). Upon these facts the petitioner's right is closely analogous to the prescriptive right which this Court in *Campbell* v. *Holt* (1885), 115 U. S. 620, 628, held would be protected from subsequent impairment by a retroactive change in the statute. Moreover, subsequent decisions of this Court, such as *U. S.* v. *Oregon Lumber Co.*, 260 U. S. 290 (1922), have shaken the authority of *Campbell* v. *Holt* with respect to the effect due to the perfected bar of limitations even as against pure contract claims.[1] The majority of State courts have preferred the dissenting opinion of Bradley and Harlan, JJ., who well said (p. 631):

> "The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. * * * The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the Constitution."

See the cases collected in 12 Corpus Juris 980-1; 2 Cooley's Constitutional Limitations (4th Ed.) pages 760-5. The New York Court in particular has refused to follow the doctrine of *Campbell* v. *Holt*. *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271 (1924). In *Tillman* v. *National City Bank and Guaranty Trust Company*, 276 N. Y. , 13 N. E. (2d) 52, decided January 11, 1938, the New York Court rejected the contention that Civil Practice Act §977-b, subdivision 18 (respt.'s brief, p. 99) enlarged the statute of limitations in connection with a sheriff's action to enforce the lien of an attachment upon funds of a nationalized Russian corporation, where objection was made that the application retroactively of the new statute would deprive defendant-respondent of property without due process of law.

[1] See comment 29 Yale L. J. 91 (1919); comment 35 Yale L. J. 478 (1926).

V. As to the alleged conflict between the New York statute of limitations and the Litvinoff assignment (Respt.'s brief, Part Four, pp. 90-7).

Respondent's argument on this branch of the case requires it to force beyond reason both the decision in the *United States* v. *Belmont*, 301 U. S. 324, and the language of the Litvinoff assignment.

As to the *Belmont* decision, it is to no avail merely to quote sentences therefrom, as respondent does, without relation to the point decided. Insistence upon "the deliberate character of the broad language used" (respt.'s brief, p. 93) is inappropriate in view of the positive limitations which the Court imposed upon its decision, 301 U. S. at 333, 337. When the Court thus expressly restricted the import of its *whole* opinion, we see no justification for appealing to "the first part of the opinion" (brief, p. 93) against "the separate second part of the opinion".

In straining to its utmost extent selected language of the majority in the *Belmont* case, respondent of course disregards the real point of that case, which was to determine what *public policy* applied in the ascertainment of the law determining the title conferred upon the United States by the Litvinov assignment. Not only has respondent ignored the point of the decision on this branch of the argument, but it has gone so far as to cite to this Court (brief, pp. 55, 85) New York Civil Practice Act § 977b, enacted in 1936, which, as applied to the property of nationalized corporations in New York, respondent presumably considers to be invalid under the *Belmont* decision.

If there were a conflict between the Litvinoff assignment and the New York statute of limitations, it is plain that the assignment could not override the statute. The assignment is conceded not to be a formal treaty requiring the advice and consent of the Senate (respt.'s brief, p. 92), and hence is not the supreme law of the land. The cases cited by re-

spondent for the exercise of the power over foreign relations as overriding state statutes[1], involved a formal treaty, namely that between the United States and Great Britain concluded September 3, 1782.

Moreover, even in the case of a formal treaty, it is clear that state legislation will not be deemed modified thereby unless it is really "inconsistent" with the treaty. *Nielsen* v. *Johnson* (1929) 279 U. S. 47, 52; *Todok* v. *Union State Bank* (1930) 281 U. S. 449. In *French Republic* v. *Saratoga Vichy Springs Co.*, 191 U. S. 427, where a claim asserted in the name of the French Republic for the benefit of a French national was held barred by laches, this Court found no conflict to be raised by the commercial treaty with France, saying that the provision therein for protection of trademarks (p. 439)

> "could never have been intended to put them [French nationals] on a more favorable footing than our own citizens or to exempt them from the ordinary defenses that might be made by the party prosecuting."

The Jay treaty involved in *Ware* v. *Hylton* and *Hopkirk* v. *Bell* plainly conflicted with the Virginia law for the confiscation of debts, by providing in the fourth article that creditors on either side should "meet with no lawful impediment" to the recovery in sterling of all *bona fide* debts theretofore contracted. Even the formal exercise of the treaty power is carefully limited by the judiciary in the protection of individual rights. *Haver* v. *Yaker* (1869) 9 Wall. 32, 34; *United States* v. *Arredondo* (1832) 6 Pet. 691, 748; *Dooley* v. *United States* (1901) 182 U. S. 222, 230.

But in the present case we have no conflict at all. Respondent in its brief is unable to point to a conflict beween the Litvinoff assignment and the existing New York code of procedure including the statute of limitations. Respondent

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[1] *Ware* v. *Hylton*, 3 Dall. 199 (1796); *Hopkirk* v. *Bell*, 3 Cranch 454 (1806). Only the latter involved a statute of limitations.

confines itself to the argument that the exercise of the Federal power of foreign relations in making the international compact "strongly implies" that State laws should not impede it. This statement may be assumed as true. Still a strong implication that a State law should not impede the execution of an executive agreement does not prove the impediment or establish the conflict. Respondent's argument involves the conclusion that, unless respondent in all cases in actions brought under the Litvinoff assignment, is permitted to recover, then the international compact is "impeded" or "trammelled." No such conclusion can be seriously urged.

The test of respondent's argument is found in the reiterated statement that it was not intended by the parties to the Litvinoff assignment that its consummation should be controlled or impeded or interfered with by State laws. What does such a statement mean? It can mean only that the parties to the Litvinoff assignment intended that the United States should take greater rights thereby than the State of Russia had; that the United States should be able to enforce claims in disregard of the statute of limitations in circumstances where the Soviet Government could not have done so. This must be the meaning of respondent's argument (brief, p. 92) that by the Litvinoff assignment the United States "impliedly undertook that it was in a position to and would collect the claims." The absurdity of any such interpretation of the Litvinoff assignment needs no emphasis. The very phrasing of the assignment in terms of monies admitted to be due or that may be found to be *due to the State of Russia* (petr.'s main brief, pp. 87-8), forbids the fantastic assumption that either sovereign supposed that the United States, in taking the assigned claims, purported to divest them, even if it could, of inherent restrictions and equities.

Finally it is to be noted that the New York statute of limitations, alleged to impede the exercise of the Federal power of foreign relations through the Litvinoff assignment of 1933, antedates such assignment. It antedates it by more than

150 years. Moreover, the acquisition of rights under the statute of limitations by the petitioner through its transactions with representatives of the State of Russia also antedated the Litvinoff assignment. The set-off was completed, and perfected by the defense of limitations before 1933. In such circumstances, the Litvinoff assignment cannot be construed as retroactive. *De Biasi* v. *Normandy Water Co.*, 228 F. 234, 240 (D. C. N. J. 1915). Cf. *Hopkirk* v. *Bell*, 3 Cranch 454, 458 (1806), where the court carefully refrained from holding that the Jay Treaty of 1783 would revive a claim already barred by statute even though, as already noted, the United States Government formally covenanted that the foreign creditor should "meet with no lawful impediment" to the recovery of his debt.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

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April 4, 1938.

APPENDIX III.

STATUTES AT LARGE (39 Q. Eliz. to 12 Chas. 2—1597-1660).
(1623) 21 James c. 16.

CHAPTER XVI.

An act for limitation of actions, and for avoiding of suits in law.

III. And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) (2) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after.

CHAPTER CCLVIII.

An ACT to reduce into one, the several acts or parts of acts concerning Limitations of Actions.

Approved December 17, 1796.

This is copied verbatim from the laws of Virginia. A small amendment was made to it at the January session of 1798, (Vol. II. Chap. 38). In 1807 a special act of limitations was passed as to suits by persons held in slavery suing for their freedom, (Vol. III. Chap. 485).

SEC. 4. All actions of trespass *quare clausum fregit;* all actions of trespass, detinue, actions *surtrover* and replevin, for taking away of goods and chattles; all actions of account, and upon the case, other than such accounts as concerns the trade of merchandize between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time hereafter, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case other than for slander; and the said actions for account; and the said actions for trespass, debt, detinue and replevin for goods and chattels; and the said action of trespass *quare clausum fregit,* within five years next after the cause of such action or suit, and not after; and the said action of trespass, assault and battery, wounding and imprisonment, or any of them, within three years next after the cause of such action or suits, and not after; and the said action upon the case for words, within one year next after the words spoken, and not after.

COLONIAL LAWS OF NEW YORK—Vol. I—1664-1719.

(CHAPTER 16).

(Copied from the original in the office of the Secretary of State. The portion of the original law, containing the signature of the Governor, and the date of passage is torn off. The date of its passage, as October 24, 1684, is given by E. B. O'Callaghan, in Hist. Int. to Journals of the Legislative Council of New York, p. 12).

* * * And Be it Further Enacted that all Actions of Trespasse Detinùe, Action of Trover, and Replevin for Taking away of Goods and Chattles all Actions of Account & upon the Case, other when such accounts as Concerne the Trade of Merchandise between Merchant and Merchant their ffactors or servants, all Actions of Debt grounded upon any Lending or Contract without specialty all Actions of Debt ffor arrearages of Rent, and all actions of Assault, Menace, Batery, Wounding & Imprisonment or any of them which shall be sued or brought att any time after the beginning of this present session of assembly shall be Commenced and sued within the time & Limitation hereafter expressed and not after (That is to say) The said Actions upon the Case (other then for slander) and the said Actions for account, and the said Actions for Trespasse, Debt Detinue and Replevin for goods or Cattle within three years, after the beginning of this present session of assembly or within Six years after the Cause of such Actions or suit & not after; And the said Actions of Trespass of Assault Battery Wounding Imprisonment or any of them, within six months next after the beginning of this present sessions of Assembly or within nine months next after the Cause of such Actions or suit and not after, And the said action upon the Case for words, within six months after the beginning of this present session of assembly or within nine months next after the words spoken and not after.

[We omit reference to the substantially similar enactment of February 26, 1788, Section X, Laws of New York 11th Session, Cap. XLIII. The present New York statute, Civil Practice Act §§ 48 and 15, is quoted at p. 92 of our main brief.]